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Supreme Court

of the

United States

OCTOBER TERM, 1969

No. 395

RUBY LAZARUS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This is a Petition of Ruby Lazarus for Writ of Certiorari to review the Judgment and Order made by the United States Court of Appeals for the Ninth Circuit, entered on April 16, 1970, affirming the Judgment against Ruby Lazarus by the United States District Court for the Central District of California.

OPINION BELOW

A copy of the Opinion of the United States Court of Appeals for the Ninth Circuit, which is not yet reported, is attached hereto (Appendix A). There is no reported decision of the United States District Court.

JURISDICTION

The Judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 16, 1970 (Appendix B). A timely Petition for Rehearing was denied on June 18, 1970 (Appendix C). This Petition for Writ of Certiorari was filed within thirty days of that date. The jurisdiction of this Court is invoked pursuant to Title 28 United States Code §1254(1).

QUESTIONS PRESENTED

I.

WHETHER PETITIONER'S FIFTH AMENDMENT CLAIM AGAINST SELF-INCRIMINATION IN GRAND JURY PROCEEDINGS WAS ADMISSIBLE IN A SUBSEQUENT PERJURY PROSECUTION.

II.

WHETHER THE PETITIONER WAS DENIED A FAIR TRIAL WHEN A FORMER PROSECUTOR, TESTIFYING AS A GOVERNMENT WITNESS, STATED THAT THE GRAND JURY WAS INVESTIGATING "... A MEETING ... WHICH INVOLVED PEOPLE WHO WERE REPUTEDLY VERY HIGH UP IN THE MAFIA ORGANIZED CRIME SYNDICATE IN THIS COUNTRY".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment Five, United States Constitution:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

Title 18 United States Code §1621:

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both . . . "

STATEMENT OF THE CASE

On November 16, 1967, a Federal Grand Jury for the Central District of California returned a seven count Indictment against the petitioner, charging him with violations of Title 18 United States Code §1621, to-wit: committing perjury before that body on October 18, 1967 (C.T. 2-11).[1]

[1] C.T. refers to Clerk's Transcript.

The jury trial commenced on April 16, 1968, before the Honorable E. Avery Clary, and was concluded on April 18, 1968. The Court entered Judgment of Acquittal on Counts Two, Three, Five and Six, and the jury returned guilty verdicts on the three remaining counts, One, Four and Seven (C.T. 78-81).

On May 27, 1968, the petitioner, who is presently free on bond, was sentenced to the custody of the Attorney General for a period of thirty months on each of the three counts, to run concurrently, and was fined $1,000.00 (C.T. 121).

STATEMENT OF THE FACTS

On December 14, 1966, and March 9, 1967, pursuant to subpoena, the petitioner appeared before a Federal Grand Jury and declined to answer a series of questions on the ground of self-incrimination. On the latter date, a United States District Judge, pursuant to Title 47 United States Code §409(l), granted the petitioner immunity and directed him to answer the Grand Jury questions. On March 10, 1967, notwithstanding the grant of immunity, the petitioner continued to decline to answer the questions on the same ground. The petitioner was adjudicated in contempt for which he was committed to custody until he purged himself, or otherwise was discharged according to law.[2]

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[2]Reports of these proceedings are found in In Re Lazarus, (C.D. Calif., 1967) 276 F.Supp. 131 & 150.

After seven months in custody, the petitioner requested to be brought before the Grand Jury. On October 18, 1967, he appeared and testified. It is this testimony that was the subject of the prosecution for perjury, as follows[3]: (C.T. 2-11).

Count One . . .	Whether or not the petitioner used the telephone at certain premises in Palm Springs, California;
Count Two . . .	Whether there was any discussion of gambling during that period of time;
Count Three . . .	Whether there was a dispute between the men who were in Palm Springs, California;
Count Four . . .	Whether the petitioner placed wagers with any bookmaker other than Mickey Zion;
Count Five . . .	Whether the petitioner had line information from any source other than newspapers;
Count Six . . .	Whether Multiple Sports News Service provided line information to the petitioner;
Count Seven . . .	Whether the petitioner placed bets with the Prokos Brothers at bookmaker's odds.

[3]As heretofore indicated, the Court entered Judgment of Acquittal on Counts 2, 3, 5 and 6.

. In the opening statement to the jury, the prosecutor stated that the Grand Jury " . . . began an investigation of possible violation of the Federal laws relating to wagering activities. This investigation centered around the activities of several indiviiduals who gathered in October, 1965, at a home in Palm Springs, California." (R. 35)[4]

The government's first witness, who after identifying himself as being the former Chief of Special Prosecutions Division of the Department of Justice, referred to the provisions of Federal Statutes that the Grand Jury was investigating, and testified over a hearsay objection:

> "Your Honor, we had information that in Palm Springs, California, in October, 1965, there was a meeting at a certain residence there which involved people who were reputedly very high up in the Mafia organized crime syndicate in this country." (R. 69)

A motion for mistrial was denied. (R. 72) The witness then described two of the participants (not the petitioner) at the meeting as being "high important figures in organized crime and being connected with Vito Genevese". (R. 74) A renewed motion for mistrial was denied. (R. 75) While later reading the Grand Jury transcript wherein the petitioner asserted his Fifth Amendment privilege, the prosecutor read, "Did Alo use the phone in connection with the gambling or other activities of the criminal syndicate known as La Cosa Nostra or the Mafia?" (R. 531) Another motion for mistrial was made and denied. (R. 572)

Prior to the jury being impaneled, the defense requested that counsel be directed not to inform the jury that the petitioner had invoked his Fifth Amendment

[4]R. refers to Reporter's transcript.

privilege before and after being granted immunity. (R. 9-12) Later, the prosecutor's suggestion of offering the petitioner's Fifth Amendment claim and the grant of immunity was objected to as being "highly prejudicial". (R. 77, 78)[5] On these occasions, the Court sustained the position of the petitioner. Once again, the issue was raised, and once again, the petitioner objected. On this occasion the petitioner cited and argued *Grunewald v. United States*, 353 U.S. 391 (1957), asserting it was error to inform the jury that the petitioner had exercised his Fifth Amendment privilege against self-incrimination. (R. 290-293) The Trial Court took the matter under consideration and subsequently overruled the objection. (R. 438, 439)

Thereafter, in the government's case in chief, the prosecutor read grand jury transcripts and Court Orders to the jury disclosing: That the petitioner exercised his Fifth Amendment claim against self-incrimination 21 times prior to the grant of immunity (R. 515-522); the order granting immunity, which also disclosed his Fifth Amendment claim (R. 523); the petitioner's Fifth Amendment claim 26 times after the grant of immunity (R. 524-534); and the order adjudicating him in contempt, which also disclosed his Fifth Amendment claim (R. 534).

In closing argument, the prosecution urged that the petitioner's Fifth Amendment claim was inconsistent with the petitioner's ultimate grand jury testimony, because the grand jury testimony did not in fact incriminate him. (R. 699-701)[6].

[5]The petitioner did not testify in his defense.

[6]This, of course, is incorrect since for example the petitioner acknowledged in his grand jury testimony that he was a professional gambler in jurisdictions wherein gambling is illegal (Gov't. Exhibit 6).

REASONS FOR GRANTING THE WRIT

1. The Opinion of the Court of Appeals is in conflict with *Grunewald v. United States, supra,*

2. If *Grunewald* is not controlling, then this Court should decide under what circumstances, if any, may a person's self-incrimination claim be used against him.

3. The immaterial testimony placing the petitioner at a meeting with high-level members of the Mafia was a departure from the generally-accepted standards of a fair trial and is in conflict with numerous decisions of other Circuits which have reversed judgments for much less prejudicial testimony.

ARGUMENT

Relying basically upon the dicta in footnote 3 of this Court's Opinion in *On Lee v. United States*, 343 U.S. 747. (1952)[7], the Court of Appeals declined to consider the constitutional issue presented by the use of the grand jury transcripts and the court orders reflecting the petitioner's self-incrimination claim. The Court appears to say that before it would consider the constitutional question, the talismanic word "constitutional" must be included in the language of the objection itself.[8]

[7] This Court, commenting upon the propriety of considering the Fourth Amendment question in that case, pointed out "no mention of the search and seizure argument for exclusion" was made during the trial.

[8] This is in conflict with that Court's in banc decision in *United States v. Scott* (#23119 Slip Opinion March 6, 1970) wherein that Court stated:

The petitioner herein requested that the jury not be informed of his exercise of his right against self-incrimination (R. 9-12); that such would be highly prejudicial (R. 77 & 78); and *Grunewald v. United States*, *supra*, was presented and argued to the Trial Court. (R. 290-293) The foregoing was more than sufficient to preserve the issue for appeal.

1. *Grunewald Is Controlling.*

Turning now to the substance of the issue, the petitioner contends that *Grunewald* is controlling and, therefore, the Court of Appeals decision is in direct conflict with that case.

Although this Court said in *Grunewald* that the decision therein was based upon the circumstances of that case,[9] the decision held that a self-incrimination claim could not be used to impeach a defendant or reflect upon his credibility.[10]

This having been a perjury trial, except for proof of the oath and materiality, the only issue was the petitioner's credibility. Accordingly, any evidence of his prior

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[9]"Moreover, we must be just as hesitant to dismiss a constitutional question for a failure to observe a formality that did not affect the course of the trial as we are to seize upon a trivial error, formally preserved, to overturn a conviction."

[10]The concurring opinion of four justices concluded that they could envision no circumstances under which a defendant's self-incrimination claim could be used against him.

[10]See *Stewart v. United States*, 366 U.S. 1 (1960); n. 13 & n. 14.

Fifth Amendment plea was introduced for the sole purpose of reflecting upon the petitioner's credibility in one way or another.

2. *If Grunewald Is Not Controlling.*

If this Court should determine that from the foregoing analysis Grunewald is not controlling in these circumstances, the petitioner submits that the issue is so vital and is of such importance that it should be settled by this Court.[11]

---

[11] The petitioner respectfully urges this Court to compare the record with the opinion of the Court of Appeals. The latter contains several truths which were given in error. Thus the Court said in footnote 3:

> "The grand jury transcripts had been made available to appellant's counsel before they were sent to the jury. These were questions asked and answered in the transcripts of Dec. 14, 1966, Mar. 9 and 10, 1967, to which no objection or claim of privilege was made, and about which no question of admissibility was involved."

The record shows that other than preliminary matters, such as name, address, right and presence of counsel and understanding of the proceedings, the petitioner's response to all questions of substance was his self-incrimination plea.

In the same footnote, the Court then stated:

> "Counsel for appellant had the opportunity to ask the court to delete those portions where appellant took the Fifth Amendment but he did not do so. However, he requested other portions to be deleted and the court granted his request. 86, 138, 161)"

The portion of the above quote referring to counsel's request that the grand jury transcripts be deleted refers only to the grand jury testimony of October 18, 1967, wherein the petitioner did testify, which testimony was the basis for the indictment. On the other hand the entire purpose of offering the grand jury proceedings prior to October 18 and the petitioner's objection to it was the disclosure of the petitioner's self-incrimination plea. How could counsel ask that it be deleted?

3. When considering the petitioner's motion for mistrial after the Mafia reference, the Trial Court immediately recognized the lack of materiality, the prejudicial effect of the testimony, and its inability to instruct the jury to disregard it.[12] (R. 70) The Court of Appeals itself acknowledged that the reference to the Mafia was not material to the proof of the perjury charge.

Because the nature and substance of prejudicial evidence varies so greatly, comparison with other Courts of Appeals in order to support a claim of conflict of Circuits is difficult. It should be noted, however, that for far less sinister and prejudicial evidence, Courts of Appeals have been quick to reverse convictions.

An immaterial chain and bullwhip introduced into evidence. *Thomas v. United States*, (5th Cir., 1967) 376 F.2d 564.

Defendant paid $100.00 fine for possession of cocaine. *Sang Soon Sur v. United States*, (9th Cir., 1948) 167 F.2d 431.

Defendant had been arrested in an unrelated burglary charge. *Lyda v. United States*, (9th Cir., 1963) 321 F.2d 788.

A witness stated that he had seen the defendant "come in and out of jail and spoke to him for approximately a year and a half". *Odom v. United States*, (5th Cir., 1967) 377 F.2d 853.

[12]The Trial Court did, however, later tell the jury that this was hearsay and not offered for the truth of it. (R. 72) (What meaning such an instruction has to a lay jury is debatable.)

That the defendant made a statement regarding a forged prescription. *United States v. Meagley*, (7th Cir., 1957) 239 F.2d 637.

An immaterial conversation between the defendant and the wife of a co-conspirator indicating that the defendant should be ashamed of himself in the manner in which he was dealing with people, but that the defendant didn't care because these people did not care about them. *Scott v. United States*, (5th Cir., 1959) 263 F.2d 398.

"The public has been inundated in the past twelve to fifteen years with the word "Mafia". Murder, arson, robbery, narcotics, gambling, bribery and extortion are only a few of the evil deeds attributed to the word "Mafia".[13]

It is only reasonable to believe that the impact of placing the petitioner at what was described as a high level meeting of the Mafia syndicate had a material effect on the jury's decision.[14]

Whether or not the former prosecutor and the trial prosecutor conferred prior to trial as to the substance of the testimony to be elicited is unknown to the petitioner. From the nature of the questions and the responses and the prosecutor's urging upon the Court the materiality of the "mafia" issue, it would appear that the questions and answers were calculated. The Mafia reference was improper and was, no doubt, a type of foul blow that this Court envisioned in *Berger v. United States*, 295 U.S. 78 (1935).

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[13] *Boyd v. United States*, 142 U.S. 150 (1892).

[14] See *Kotteakos v. United States*, 328 U.S. 750, 764 (1946).

CONCLUSION

The petitioner respectfully submits that a review of the record will indicate that this petition for writ of certiorari should be granted and that the judgment of the Court of Appeals affirming the judgment of the United States District Court should be set aside and the judgment of conviction reversed.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23,290

UNITED STATES OF AMERICA,

Appellee,

vs.

RUBY LAZARUS,

Appellant.

[April 16, 1970]

Appeal from the United States District Court For the Central District of California

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Before: CARTER and HUFSTEDLER, Circuit Judges, and THOMPSON,* District Judge

JAMES M. CARTER, Circuit Judge:

Lazarus appeals from his conviction upon three out of seven counts of perjury under 18 U.S.C. § 1621, based on his testimony before a grand jury. He raises four questions: Did the district court err, (1) in denying his motion for a mistrial based upon a Government witness' testimony linking Lazarus to the Mafia, (2) in admitting portions of transcript of the hearings before the grand jury in which

*Honorable Bruce R. Thompson, United States District Judge, Reno, Nevada, sitting by designation.

Lazarus had asserted his privilege against self-incrimination, (3) in admitting bookmaking documents seized from a person other than Lazarus, and (4) in denying his motion for judgment of acquittal?

In 1966 a federal grand jury began an investigation of syndicated gambling activities after receiving information that a meeting of some of the members of the syndicate had been held at Palm Springs and that telephones were used during the meeting to transmit gambling information across state lines. The investigation was an inquiry into possible violations of federal laws concerning interstate transmission of gambling information, 18 U.S.C. § 1084, interstate travel in aid of racketeering enterprises, 18 U.S.C. § 1952, and of further possible violations of the Federal Communications Act and the Internal Revenue Code.

Lazarus was called before the grand jury on December 14, 1966. He refused to respond to any questions, invoking his Fifth Amendment privilege. He was again summoned to testify on March 9, 1967, and he again invoked his privilege and refused to testify. The Government thereupon obtained an order compelling Lazarus to testify pursuant to the immunity provisions of the Federal Communications Act, 47 U.S.C. § 409(l).

On March 10, 1967, he was called to appear before the grand jury to answer questions about his association with the other alleged participants at the Palm Springs meeting, about his own activities there, and about his knowledge of telephone calls from Palm Springs to Multiple Sports Service and to the Prokos brothers in Miami, Florida. Although he knew that he could no longer rely on the privilege in view of the immunity order, he declined to answer all questions put to him. The district court ordered him to

answer, Lazarus refused, and the court found him in contempt for which he was committed to custody until he purged himself of contempt.[1] After seven months in custody, Lazarus requested and was granted an appearance to testify before the grand jury on October 18, 1967. It is his testimony on October 18, 1967, that is the subject of his prosecution for perjury.

Lazarus admitted before the grand jury that he visited the residence in Palm Springs for five or six days and that Elliott Paul Price, Tony Salerno, Jerry Zarowitz, Vincent Alo, and two women were also present during that time. The subject of Count One of the indictment was his testimony that he did not use the telephones in the Palm Springs house and that he did not see anyone else do so. The subject of Counts Four and Seven was his testimony that Mickey Zion was the only bookmaker with whom he ever placed a bet and that he never placed bets at bookmaker's odds with the Prokos brothers in Miami. The jury returned guilty verdicts on Counts One, Four and Seven.

I

THE DENIAL OF MOTION FOR A MISTRIAL

The Government's first witness was a former United States Attorney who, during his Government service, had been in charge of the Special Prosecutions Division, engaged in prosecuting cases in the general field of organized crime. He was called by the Government in order to establish the materiality to the grand jury investigation of Lazarus' testimony. The court instructed the jury that the

[1] Reports of the contempt proceedings are found in *In re* Lazarus (C.D. Cal. 1967) 276 F.Supp. 434; *In re* Lazarus (C.D.Cal. 1967) 276 F.Supp. 150.

testimony was not received to prove the truth of the facts contained therein but to show the nature of the investigation and what prompted it.

In response to questions about the information he had relayed to the grand jury and upon which its investigation was partially based, the witness stated:

> "[W]e had information that in Palms Springs, California, in October 1965 there was a meeting at a certain residence there, which involved people who were reputedly very high up in the Mafia organized crime syndicate in this country.
>
> ". . . .
>
> "We had information that the phones in this residence had been used by certain individuals and that the telephones were used to make calls across State lines to other parts of the United States, in connection with gambling activities.
>
> "We also heard—had information that a dispute had risen among certain members of an alleged gambling syndicate, and that one of the purposes of the meeting at Palm Springs was to resolve that dispute.
>
> ". . . .
>
> "We heard that there was present Elliott Paul Price, Tony Salerno, Jerry Zarowitz, Vincent Alo, also known as Jimmy Blue Eyes, Ruby Lazarus and two young women who were reputed to be girl friends of two of the people I have named.
>
> ". . . .
>
> "Elliott Paul Price, we had information he was involved on a large scale in gambling activities,

not only interstate in the country but also in Canada and in the Montreal area. We had information he was involved in a bookmaking operation in and around Boston.

"We also knew that he was under indictment for Federal violations in the Southern District of New York.

". . . .

"As to Vincent Alo and Tony Salerno, we had information they were high important figures in organized crime activity on the East Coast and had been connected with Vito Genovese."

Lazarus' counsel did not move to strike the testimony referring to the Mafia, but he did move for a dismissal [TR. 69], which we will charitably treat as a motion for a mistrial, on the ground that the witness' reference to the Mafia was prejudicial. The court denied the motion, admonished the prosecuting attorney to avoid references to the Mafia, and reiterated its prior instruction to the jury that the witness' testimony was hearsay, not received for the purpose of proving the truth of the facts asserted.

Two days later the prosecuting attorney in reading the transcript of the grand jury proceedings of March 10, 1967, read a portion of the transcript in which Lazarus declined to answer the question: "Did Alo use the phone in connection with the gambling or other activities of the criminal syndicate known as La Cosa Nostra or the Mafia?" [TR. 531]: Lazarus' counsel had been previously supplied with the transcript and had specified out of the presence of the jury certain portions thereof which he

objected to and did not want read, and the court by rulings complied with his request. [TR. pages 86, 138, 161]. He did not object beforehand to the inclusion of the challenged segment of the transcript quoted above. Nor did he object when it was read. At the conclusion of the reading he neither objected, moved to strike or moved for a mistrial. [TR. 551]. Some time later, following the noon recess, he moved for a mistrial based on the reference to the Mafia, and the motion was denied. [TR. 572].

Testimony concerning the information presented to the grand jury was relevant to prove the subject of the grand jury's investigation and thus to prove the materiality of Lazarus' testimony before the grand jury. Disregarding for the moment the first witness' use of the word "Mafia," that information was that Lazarus and others had attended a high level meeting of members of an organized interstate gambling syndicate and that the activities of those who attended the meeting may have violated several federal statutes. Although reference to the Mafia was by no means necessary to the proof of the materiality issue, it was not wholly irrelevant to the inquiry. Part of the information spread before the grand jury was a claimed link between the members of the Palm Springs meeting and the Mafia.

Lazarus' argument is that even if the Mafia reference had some probative force, that evidence was so prejudicial that its reception deprived him of a fair trial and that the district court's denial of his motion for a mistrial was a clear abuse of discretion requiring reversal of his conviction. (*Cf. Odom v. United States*, (5 Cir. 1967) 377 F.2d 853; *Scott v. United States*, (5 Cir. 1959) 263 F.2d 398; *United States v. Meagley*, (7 Cir. 1957) 239 F.2d 637.

There well may be cases where reference in testimony linking the defendant to the Mafia, may require the granting of the defendant's motion for a mistrial. But this case is not such a case. The context of Lazarus' testimony was an investigation of organized crime and racketeering. The reference to the Mafia was made in that context. The public has long been exposed to extensive publicity about the evils of organized crime. We have no reason to suppose that publicity about the evils of the Mafia has been more extensive or more virulent than that devoted to members of organized crime who are not Mafia associates. We likewise have no reason to suppose that the public has less hatred toward big time racketeers who are not members of the Mafia than it has toward those who are. We cannot say that the omission of any reference to the Mafia would have perceptibly brightened the jury's image of Lazarus or his associates. Moreover, nothing in the later developments at the trial points unerringly to undue prejudice to Lazarus that could be attributed to the unfortunate mention of the Mafia. We hold that the mention of the Mafia did not deprive Lazarus of a fair trial and that the district court did not abuse its discretion in denying his motion for a mistrial (*Cf. People v. Curtis*, (1965) 232 Cal. App. 2d 859, 43 Cal. Rptr. 286).

The second reference to the Mafia was made when the prosecutor was reading a transcript of Lazarus' interrogation before the grand jury on March 10, 1967. Lazarus' counsel, knowing the content of that transcript, made no objection specifically directed to the challenged question and no motion to strike it before it was read to the jury. Counsel cannot thus withhold objection to testimony and thereafter seek a mistrial based upon its introduction.

II

THE USE OF THE TRANSCRIPTS

Portions of the grand jury transcripts of December 14, 1966 and March 9 and 10, 1967[2] were read to the jury. They were admitted for the purpose of proving that Lazarus' false testimony on October 18, 1967, was willful. The portions indicated instances where Lazarus had exercised his right against self incrimination and had refused to answer certain questions.

We think that the record shows (a) the appellant did not preserve his record below nor raise a constitutional question; (b) that in any event he suffered no prejudice requiring a reversal from the admission of such reference; (c) we believe that *Grunewald v. United States*, 353 U.S. 391 (1957) is not controlling.

(a) *Appellant Did Not Make a Proper Record and Did Not Raise Constitutional Objection to the Use of the Grand Jury Transcripts.*

A general objection is not sufficient to raise a constitutional question. In *On Lee v. United States*, 343 U.S. 747

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[2]The transcripts are identified as follows:

Ex. 1—Transcript of grand jury proceedings of 12/14/66.

Ex. 2—Transcript of grand jury proceedings on Mar. 9, 1967; and transcripts of grand jury proceedings on Mar. 10, 1967 after Lazarus had been ordered to answer questions and granted immunity by the district judge.

Ex. 3—Transcripts containing order of district judge on March 9, 1967 and transcript of proceedings before district judge on March 10, 1967 when Lazarus was held in contempt.

Ex. 4—Order granting immunity on March 9, 1967.

Ex. 5—Order holding Lazarus in contempt on March 10, 1967.

Ex. 6—Transcript of grand jury proceedings on October 18, 1967.

(1952) the court stated that a general objection "... is insufficient to preserve such a specific claim as violation of a constitutional provision ..." [page 749-50, n. 3]; *Ignacio v. People of the Territory of Guam*, 413 F.2d 513 (9 Cir. 1969).

Rule 51 Fed.R.Crim.P., requires that the objection and the grounds therefor be stated. Failure to object constitutes a waiver. *Ignacio*, supra.

We have searched the record[3] and the only objections

[3]We examine the record to ascertain what objections were made to the reading of the transcripts of appellant's appearances before the grand jury.

On the day the trial started, appellant's counsel requested the court "to order both parties to make no reference to the fact that Mr. Lazarus, during his testimony in front of the grand jury, took the Fifth Amendment several times and even took it after being granted immunity by the government." [Tr. page 9]. The government argued the transcripts were admissible but the court said, "I can't go along with your theory." [Tr. page 12]. No grounds constitutional or otherwise were stated or argued by appellant.

After the jury was impaneled government counsel again raised the question and urged that the jury should know that appellant had been given immunity. [Tr. pages 31-32]. Defense counsel then stated:

> "The vice of that you know is that if the fact he had been granted immunity is brought to the attention of the jury they will obviously know prior to that he took the Fifth."

The court reserved ruling and instructed counsel not to mention the matter in the opening statement [Tr. pages 32-33].

Later the government offered the order signed by Judge Hauk granting the appellant immunity in his testimony before the grand jury.

"Mr. Call (defense counsel) we object on the same ground previously stated." ". . . Any evidence that he took the Fifth Amendment, and evidence he was granted immunity is highly prejudicial and has only little probative value in this case." [Tr. pages 77-78]. No other ground had been previously stated. The objection was sustained. [Tr. 79].

The grand jury transcripts had been made available to appellant's

we find are that the reading of the transcripts (1) would be "highly prejudicial" and (2) have "slight probative

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counsel before they were read to the jury. There were questions asked and answered in the transcripts of Dec. 11, 1966, Mar. 9 and 10, 1967, to which no objection or claim of privilege was made, and about which no question of admissibility was involved.

Counsel for appellant had the opportunity to ask the court to delete those portions where appellant took the Fifth Amendment but he did not do so. However, he requested other portions to be deleted and the court granted his request. [Tr. 130-136, 161].

Next the first portion of appellant's testimony before the grand jury on October 18, 1967 [Ex. 6] was read to the jury. In the portion read there was no reference to the appellant's claim of his privilege under the Fifth Amendment, or the subsequent order requiring him to answer, or the order holding him in contempt. [Tr. 140 *et seq.*]

There followed a discussion as to the witness Weisberg who was granted immunity and as to the reading of the transcript of his appearance before the grand jury [Tr. 284-288]. Defense counsel stated, "Our position is the same", but he stated in response to the court's question, that he had no authorities [Tr. 288]. After the noon recess the defense counsel cited *Granzow et al. v. United States*, 353 U.S. 391 [Tr. 290]. The court appeared to think he was talking about the problem of Weisberg. Counsel stated, "I am talking about the immunity problem of Mr. Lazarus." [Tr. 29].

Government counsel then specified additional pages and lines of the transcript of 10/18/1967 he proposed to read [Tr. 379] and read them without objection from the defense. This was additional testimony of Lazarus before the grand jury. There was no mention of the claim of the Fifth Amendment or of the order granting him immunity, or of the order holding him in contempt.

The court then ruled that the government on the issue of wilfullness could use the earlier transcripts to show that appellant refused to testify before the grand jury; that he was granted immunity and went to jail instead of testifying until October 1967. To the court's inquiry as what defense counsel thought of the ruling, Mr. Rosen replied, "If that's the court's ruling so long as my agreement doesn't override my objection." [Tr. 138-39]. Up to this time the only objection made had been "highly prejudicial" and "little probative value."

Following the court's ruling that the transcripts of 12/11/66 and 3/9 and 3/10/1967, and the remaining portions of the transcript of 10/18/67 could be read, defense counsel specified a portion he claimed was objectional because it assumed facts not in evidence [Tr. 140-41]. The court reserved ruling. The following morning the reading of the transcript of 12/11/66 proceeded. The matter assigned as objection-

value." These are the objections counsel refers to in the record when he refers to the "same objection" or "renews

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able was omitted. [Tr. 450]. No request was made by appellant's counsel that the particular portion pertaining to the claim of privilege not be read. Appellant's counsel of course, was entitled to rely on the fact that the court had overruled his objection. But the record clearly shows the limited scope of that objection.

The government then moved the introduction into evidence of Exhibits 1 through 5. [See note No. 2].

"Mr. Rosen (defense counsel) . . . The defendant renews the objection." The court overruled the objection. [Tr. 510-11] and Ex. 1, 2 and 3 were admitted. Ex. 4, an application and order granting immunity and Ex. 5 an order finding Lazarus in contempt of court were then admitted.

The transcript of 12/11/1966 was read without further objection. [Tr. 511-522]. Next was read without further objection Ex. 4, the order of Judge Hauk directing appellant to answer questions and granting appellant immunity; and Ex. 3 concerning the questioning before the grand jury on Mar. 10, 1967 following the grant of immunity, where appellant again refused to testify.

Without further objection, Ex. 5, the contempt order of Mar. 10, 1967, was read. [Tr. 531]. Next without further objection Ex. 6, the remaining proceedings before the grand jury on Oct. 18, 1967 were read. [Tr. 551].

No motion to strike or for a mistrial was then made. [Tr. 531]. Following the noon recess the following occurred:

"Mr. Rosen (defense counsel): A motion for a mistrial . . . on the ground that having once again, when reading from the transcript of the testimony of Mr. Lazarus, once again the Cosa Nostra and Mafia were mentioned as he read to the jury." [Tr. 572]. The motion was denied. We have considered the problem concerning the reference to the Mafia in Part I of the opinion.

After the government rested its case [Tr. 602] appellant's counsel moved for a judgment of acquittal on the ground that a prima facie case was not proved as to each count of the indictment. [Tr. 603]. No mention was made of the reading of portions of the transcript. The ruling was reserved and later denied. No motion for mistrial was made.

After offering certain stipulations in evidence the appellant rested. [Tr. 630]. No motion for a mistrial or further objections were made at the end of the evidence and before the case went to the jury.

Instructions to the jury had been previously settled. No objections were made to the instructions after they were given. [Tr. 753].

The court instructed, "A false statement that is the result of honest

his objection." In the motion for new trial the reading of the transcripts are assigned as error but no grounds, constitutional or otherwise, were set forth.

In *Leary v. United States*, 395 U.S. 6 (1969) the defendant did not assert his constitutional privilege until

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mistake is not perjury. If the answers given by the defendant were inadvertently or carelessly made, or if the defendant was mistaken as to the meaning of the question, it is not perjury. In this connection the language used by the defendant must be considered in the light of his education, intellectual and environmental background." [Tr. 717].

Ex. 1, 2, 3, 4 and 5 were not allowed to go to the jury. The court made clear that only the portions read were in evidence.

Following the verdict of guilty on April 9, 1968 [Tr. 762] the appellant on May 6, 1968 filed written motions for judgment of acquittal and for a new trial. [Clk. Tr. 83 and 91]. The motion for acquittal concerned only the evidence. The motion for a new trial contained in point = 7 the following:

> "The court erred in admitting into evidence the transcript of prior testimony before the grand jury of the defendant, wherein he declined to answer questions on the ground that it may tend to incriminate him."

No reasons for the error were specified. [Clk. Tr. 83-84].

At the time fixed for the argument on the motion for new trial and for sentence, defense counsel stated:

> "And then, over objection, counsel was reading a portion of the grand jury events regarding Mr. Lazarus' refusal to answer questions at a prior grand jury hearing, and in that transcript there was again a reference to the Cosa Nostra and/or the Mafia." [Tr. 775].

And further:

> "I would also like to urge upon the court consideration on the motion for new trial as to counts One, Four, and Seven, the reading of Mr. Lazarus' prior testimony, wherein he had taken advantage of the constitutional privilege to refuse to answer on the ground it would tend to incriminate him." [Tr. 777].
>
> "I don't suggest and I have no authority, that perhaps the question of his immunity may have been presented to the jury to show the totality of the circumstances of the element of wilfullness, but not his prior invocation of constitutional privilege, as set forth in the Grunewald case." [Tr. 779].

his motion for new trial. [page 27]. The court remarked it "would have been preferable for petitioner to have asserted the privilege at the trial . . .". But in *Leary* the defendant, on his motion for new trial, did finally raise the constitutional question. Moreover in *Leary* the trial occurred before *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968) and *Haynes v. United States*, 390 U.S. 85 (1968). In our case the trial was long after *Grunewald v. United States*, 353 U.S. 391 (1957), the principal case relied on by appellant.

In *United States v. Scott*, (9 Cir. No. 23119, slip opinion Mar. 6, 1970) there was a "solid wall of authority" against the constitutional claims which excused the defendant's failure to raise them. *Meadows v. United States*, (9 Cir. No. 24756, slip opinion Dec. 23, 1969) presents the same situation.

No motion for a mistrial on any constitutional grounds was ever made. The only motion for mistrial which was made was directed to the reference to the Mafia in the reading of the transcript and not to the reading of the transcript itself. [Tr. 572]. A defendant should not be allowed to by-pass the requirement of Rule 51, Fed.R.Crim.P., that he state his objections and the grounds therefor, and to by-pass a motion for a mistrial, and then, after the verdict turns out to be one of "guilty," raise his objection. *Devine v. United States*, (9 1960) 278 F.2d 552, 556. The real concern of counsel for appellant was the reference to the Mafia and Cosa Nostra in the grand jury transcripts as shown by his motion for mistrial. [Tr. 572].

(b) *Appellant Did Not Show Below Nor Does he Show Here How he Suffered any Prejudice.*

Appellant did not spell out to the trial court and does not tell us on appeal how he was prejudiced by the fact that the jury knew he had previously refused to answer questions on his lawful claim of the Fifth Amendment privilege. No error is claimed in the briefs as to the introduction of the order requiring appellant to answer questions or the order holding him in contempt until he answered, nor to the reading of the portions of transcript of October 18, 1967, in which he testified as to why, after being held in contempt, he decided to answer the questions and secure his release from jail. Appellant, as noted later herein, apparently wanted the evidence as to the time spent in jail to be before the jury.

The grand jury transcript of October 18, 1967, which contained the perjured statements, and to which no objection was made, painted a sorry picture of appellant. He admitted his occupation was gambling and had been such since 1945, but stated that he had never "accepted a wager" since World War II. He claimed no other occupation. He named one bookmaker, Zion, as the only person with whom he had placed a bet. He had known Chris and John Prokos of Miami for 18 to 20 years but never heard they were bookmakers; that he had made personal bets with them at sporting events, "head to head" bets, but without "bookmaker's odds or vigorish." He denied making calls to the Prokos brothers from Palm Springs in October 1965 and did not know if anyone else made calls. It was the records seized at the Prokos Brothers warehouse in Miami that tied appellant into placing bets with them and owing them a substantial sum of money. The record shows how the business of bookmaking is carried on.

Appellant had competent counsel and trial strategy could well have dictated that the jury know that appellant had already served from March 1967 to October 1967 (7 months) for contempt of the trial court's order to testify. These facts were all spread out in the transcript read to the jury together with appellant's statement that he had wanted to testify earlier than October 1967, but his attorney was not available. [Tr. 550-551]. The record showed that appellant had well paid by the 7 months imprisonment for his contempt in refusing to answer. Having this before the jury was probably thought to be important by the defense.

Exhibit 3 was the transcript of proceedings in the district court on March 9, 1967, wherein the district court granted Lazarus immunity and ordered him to answer the questions; and the proceedings in the district court on March 10, 1967 when Lazarus was held in contempt and committed to jail. Exhibit 4 was the order granting immunity and Exhibit 5 was the order of contempt.

Lazarus in his brief does not complain of this evidence and note No. 3, supra, shows that on the offer of these Exhibits into evidence counsel stated only "The defendant renews the objection." [Tr. 510-11]. The only prior ground of objection had been "higly prejudicial and . . . little probative value." [Tr. 77-8].

From Exhibits 3, 4 and 5 the jury knew Lazarus had claimed his privilege against answering questions, had been granted immunity, had again refused to answer the questions and had been jailed for contempt. The claims of privilege on December 14, 1966 and March 9, 1967, added nothing of significance to the evidence from Exhibits 3,

4 and 5. We cannot see how in this setting, the fact that the jury knew of the prior claims of privilege on the two earlier dates, could have had any impact on the jury or to have in any way affected their verdict. The error if any, was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967); *Harrington v. California*, 395 U.S. 250 (1969).

(c) *The Grunewald Case is Not Controlling.*

Grunewald v. United States, 353 U.S. 391 (1957) is urged upon us as controlling. We do not have occasion to consider any constitutional problems arising under *Grunewald*, since as shown, the constitutional question was not raised below. In addition, the prior transcripts were offered as relevant to the issue of intent, a matter not considered in *Grunewald*.

In *Grunewald*, the defendant's prior claim of his Fifth Amendment privilege was used to impeach the defendant as a prior inconsistent statement. Not so here. Next the court held the prior invocation of the privilege was proper and was not in fact inconsistent with the defendant's testimony at trial. [page 419-24]. No such claim of inconsistency was made here.

It is contended that counsel for the Government argued to the jury that the claim of the privilege by the appellant was inconsistent with his subsequent testimony. We do not so read the record. The argument stressed the willfulness inherent in a deliberate attempt to shield others and to avoid the sanctions of the contempt order. No objection to the argument was made in the court below and cannot now be raised. *Devine v. United States*, supra.

III

ADMISSION OF THE BOOKMAKING RECORDS

Lazarus was convicted of counts 1, 4 and 7 and received concurrent sentences. The bookmaking records which were offered in evidence concerned only counts 4 and 7. The subject of count 1 was Lazarus' testimony that he did not use the telephone in the Palm Springs house, and that he did not see anyone else do so. Since we hold the conviction good as to count 1, there is no occasion to examine the problem of the bookmaking records as to counts 4 and 7, on which concurrent sentences were imposed.

Benton v. Maryland, 395 U.S. 784 (1969) does not undermine the concurrent sentence doctrine. *United States ex rel. Weems v. Follette*, (2 Cir. 1969) 414 F.2d 417; *United States v. Barsaloux*, (5 Cir. 1969) 419 F.2d 1299. See, *Keith v. United States*, (No. 23,148, 9 Cir. 2 2 70).

We find no merit in appellant's final contention that there was error in the denial of his motion for a judgment of acquittal.

The judgment is Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 23290

UNITED STATES OF AMERICA,

Appellee,

vs.

RUBY LAZARUS,

Appellant.

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered April 16, 1970.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 23,290

UNITED STATES OF AMERICA,

Appellee,

vs.

RUBY LAZARUS,

Appellant.

Filed June 18, 1970, Wm. B. Luck, Clerk.

ORDER

Before: CARTER, HUFSTEDLER and THOMPSON, Circuit Judges.

The panel having voted unanimously to deny the petition for rehearing and to reject the suggestion for a hearing in banc and no member of the Court having voted for a rehearing in banc,

Ordered that the petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

No. 80-[illegible]

FILED

OCT 6 1980

[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1980

RUBY LAZAROS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

[illegible]
Solicitor General

[illegible]
Assistant Attorney General

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[illegible]
Attorneys

Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 395

RUBY LAZARUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 425 F. 2d 638.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1970. A petition for rehearing was denied on June 18, 1970 (Pet. App. C). The petition for a writ of certiorari was filed on July 15, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in the circumstances of this case two references to the Mafia were unduly prejudicial.

2. Whether evidence of petitioner's invocation of the privilege against self-incrimination, which underlay a subsequent grant of immunity, should have been excluded in his subsequent prosecution for perjury before the grand jury.

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted on three counts of perjury, in violation of 18 U.S.C. 1621. On May 27, 1968, he was sentenced to concurrent terms of thirty months' imprisonment and fined $1,000. The court of appeals affirmed.

The evidence showed that, in 1966, a federal grand jury began an investigation of syndicated gambling activities upon information that several individuals in the syndicate had met in Palm Springs, California in October, 1965, and that telephones had been used there to transmit gambling information interstate (Tr. 73-76). Petitioner, as a participant in the Palm Springs meeting, was called before the grand jury on December 14, 1966. He refused to answer any questions, claiming his Fifth Amendment privilege against self-incrimination (Tr. 517). He was recalled on March 9, 1967 and again invoked the privilege. The government then obtained an order compelling him to testify, pursuant to immunity provisions of the Federal Com-

munications Act, 47 U.S.C. 409(1) (Tr. 522-523). On March 10, 1967, he again appeared, but, despite the grant of immunity, still refused to answer. He was found in civil contempt and committed to custody until he complied with the order (Tr. 534).

After seven months in custody, petitioner requested leave to appear before the grand jury. On October 18, 1967, he was called to testify (Tr. 81-83). During the course of his testimony, he stated that he recalled no one, including himself, using the telephones at the house in Palm Springs in October, 1965 (Tr. 449, 451); that he had never placed a wager with the Prokos brothers (bookmakers in Miami, Florida) (Tr. 149); and that he had never placed a bet with any bookmaker other than Mickey Zion (Tr. 147). These statements formed the basis for petitioner's later conviction for perjury.

At trial two witnesses testified that petitioner had used the telephone while at the Palm Springs residence in 1965 (Tr. 479, 502). Evidence also established that, during the summer preceding his visit to Palm Springs, calls charged to the credit card of the Prokos brothers were made daily to the Warwick Hotel in New York City where petitioner was then staying, or to the residence of petitioner's in-laws in Rockaway Beach, New York, where he sometimes visited (Tr. 90, 95; 158, 178; 199-210; 217). Calls charged to petitioner during his stay at the Warwick were made to the Multiple Sports Service, a line service located in Miami (Tr. 94; 214-215). Calls to the Multiple Sports Service had also been made from Palm Springs (Tr. 326-329).

ARGUMENT

1. The government's first witness, a former Assistant United States Attorney who had assisted in the grand jury proceeding, was called to testify to the purpose of the investigation. During the course of his testimony, he stated:

> [W]e had information that in Palm Springs, California, in October, 1965, there was a meeting at a certain residence there, which involved people who were reputedly very high up in the Mafia organized crime syndicate in this country. (Tr. 69)

Defense counsel objected to the reference to the "Mafia" as being highly prejudicial and moved for a mistrial. The trial judge denied the motion and twice instructed the jury that the testimony was hearsay and not admitted to prove the truth of what the witness said, but to show the nature of the investigation (Tr. 72, 75-76). Two days later, the prosecutor read a portion of the transcript of the grand jury proceeding of October 18, 1967: "Did Alo use the phone in connection with the gambling or other activities of the criminal syndicate known as La Cosa Nostra or the Mafia?" (Tr. 531). Defense counsel's motion for a mistrial was denied.

As defined by 18 U.S.C. 1621, perjury is committed when the witness "states * * * any *material* matter which he does not believe to be true * * * ." (Emphasis added.)

The first statement quoted above relates to the government information which prompted the grand

jury to investigate and was admitted for the limited purpose of establishing the materiality of petitioner's testimony before that body. Evidence identifying individuals with an organized criminal syndicate was relevant in this context. Moreover, the trial judge clearly defined the purpose of the testimony so that the jury would not be misled. Petitioner has shown no prejudice resulting from these references. *Spencer* v. *Texas*, 385 U.S. 554. See also, *United States* v. *Weber*, 197 F. 2d 237 (C.A. 2), certiorari denied, 344 U.S. 834; *United States* v. *Moran*, 194 F. 2d 623 (C.A. 2), certiorari denied, 343 U.S. 965.

As to the transcript reference, defense counsel, despite ample opportunity to have any offending portion of the transcript deleted before it was offered into evidence, made no objection either before or soon after this was read (Tr. 86, 138, 161). As the court below noted, petitioner cannot under such circumstances withhold objection to the testimony and then seek a mistrial after it has been introduced.

2. At trial, portions of the grand jury transcripts of December 14, 1966, March 9, 1967, and March 10, 1967, as well as the order requiring petitioner to testify under a grant of immunity and the order finding him in contempt, were read to the jury. This evidence revealed that petitioner had invoked his Fifth Amendment privilege both prior to and after being granted immunity. As the trial judge found, the evidence showed that petitioner's responses at the later grand jury proceeding were not made impulsively and that he "knew what he was up against" in deciding to testify. The judge properly found that the jury was

entitled to consider the evidence in determining the issue of willfulness (Tr. 439-440).

Unlike *Grunewald* v. *United States*, 353 U.S. 391, the evidence here was not introduced to impeach petitioner's credibility; there was no suggestion at trial that petitioner's claim of privilege was inconsistent with any later statement made by him. The prior testimony outlined a continuous sequence of reluctance to testify on the part of petitioner, even after being granted immunity when the privilege of the Fifth Amendment no longer applied. It thus bore directly upon his willfulness, tending to show that his statements were not made inadvertently or with a lack of understanding of the questions asked and negating any inference that surprise over the subject matter inquired into caused a temporary lapse of memory.[1]

We have discovered that, although petitioner was not at any time the subject of electronic surveillance directed against him, he participated in a telephone conversation that was overheard during the course of surveillance of premises in which petitioner had no proprietary interest.[2] The overheard conversation oc-

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[1] Petitioner does not object to the admission of the order compelling him to testify and the later order finding him in contempt for his refusal to testify. Since both indicated to the jury that petitioner had previously claimed his Fifth Amendment privilege, any prejudice resulting from the reading of the transcripts was harmless. *Harrington* v. *California*, 395 U.S. 250; *Chapman* v. *California*, 386 U.S. 18.

[2] It is unclear whether petitioner's voice was actually overheard but for present purposes, standing is assumed. See *Alderman* v. *United States*, 394 U.S. 165, 176-180.

curred on March 4, 1965, seven months prior to the Palm Springs meeting and over two years before he gave the perjurious testimony for which he was convicted.

The log of that conversation disclosed only that petitioner was staying at the Warwick Hotel, New York City, on that date. At trial, evidence was introduced showing that petitioner, during the period of June 9-September 3, 1965, was staying at the Warwick and that he made telephone calls to a line service in Florida, and received calls daily which were charged to the Prokos brothers, bookmakers located in Miami. Petitioner stated before the grand jury on October 18, 1967 that he stayed at the Warwick during the summer of 1965 (Tr. 158). FBI agents testified that, on November 28, 1965, the Prokos brothers were arrested and their establishment searched (Tr. 105, 249). Lists found during the search revealed that petitioner was one of their customers (Tr. 175, 216, 373). The Prokos investigation uncovered a record of telephone calls charged to the bookmakers' account made to the Warwick while petitioner was there.

The procedure which this Court has usually followed, when advised by the Solicitor General that the government had conducted illegal electronic surveillance involving a convicted litigant, has been to remand the proceeding to the district court for a hearing to determine whether the interception was in fact illegal and, if so, whether the conviction was tainted thereby. *E.g.*, *Alderman* v. *United States*, 394 U.S. 165. Resolution of the latter issue, if it is reached, has involved the determination whether the govern-

ment used the overheard conversation in "building its case against" the accused. *Alderman* v. *United States*, *supra*, 394 U.S. at 183. That petitioner was at the Warwick Hotel on March 4, 1965 bears no apparent relationship to his subsequent stay there. Even assuming that it might be relevant, his stay at the Warwick during the summer of 1965 was known to the government from the wholly independent and lawful sources of petitioner's own statements before the grand jury and the results of the Prokos investigation. Remand to determine whether the conviction was tainted is therefore unnecessary. See our brief in opposition in *Gordon* v. *United States*, No. 1340, O.T. 1969, certiorari denied, 398 U.S. 927; *Teresa* v. *United States*, No. 1200, O.T. 1969, certiorari denied, 397 U.S. 1063; and our supplemental memorandum in *Moylan* v. *United States*, No. 885, O.T. 1969, certiorari denied, 397 U.S. 910.[3]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
RONALD G. SCHERAGA,
Attorneys.

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in the

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of the

United States

OCTOBER TERM, 1970

No. 395

RUBY LAZARUS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR RE-HEARING

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United States

OCTOBER TERM, 1970

No. 395

RUBY LAZARUS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR RE-HEARING

The government in its brief for the UNITED STATES OF AMERICA in opposition to the Petition for Writ of Certiorari acknowledged that the petitioner was the victim of telephonic electronic surveillance.

The government alleges:

1. That only one telephone conversation was overheard on March 4, 1965.

2. That the petitioner had no proprietary interest in the premises under electronic surveillance.

3. That there is no *apparent* relevancy between the overheard telephone conversation and the instant prosecution.

The government does *not* state:

1. Whose premises were under electronic surveillance. How can the petitioner contest whether or not he had proprietary interest in the premises?

2. The period of time during which electronic surveillance took place at the particular premises. This, of course, may serve as a basis for the petitioner to prove that he was on the premises or made and received other calls.

3. The type of electronic surveillance being conducted.

4. Whether or not the electronic surveillance was illegal.

The admitted electronic surveillance occurred when the petitioner was staying at the Warwick Hotel, whose manager was a government witness herein. (Tr. 89) The Solicitor General suggests that the information relating to the Warwick Hotel was discovered during the execution of an arrest warrant and search of the Prokos brothers. Although the Solicitor General, no doubt in good faith, makes these representations, he failed to state or did not

know that three F.B.I. agents who testified in the Lazarus case, Special Agents Elmer C. Mullen (Tr. 100), Edwin J. Sharp (Tr. 119) and Warren R. Welsh (Tr. 236), were also participants in a *different*[1] admittedly illegal electronic surveillance installed at the home of one Frank Rosenthal,[2] *whose name, activities and telephone numbers permeated the grand jury proceedings and the trial of the petitioner.*

Whether or not there is a thread of taint woven into the prosecution, (made invisible by governmental interaction) can only be determined by adversary proceedings. The petitioner should not be required to accept, in a vacuum, the Solicitor General's self-serving and self-evaluating representations. This Court has heretofore rejected this method in favor of evidentiary hearings. *Alderman v. United States*, 394 U.S. 165. See also this Court's per curiam opinion in *Giordano v. United States*, 394 U.S. 310.

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[1]It is assumed that the electronic device mentioned by the Solicitor General is different than the one installed at Rosenthal's home in that the former appears to be a wiretap and the latter is a "bug".

[2]This was discovered in the case of *Kane, et al. v. United States of America*, United States District Court for the Southern District of Florida, #66-196-Cr-TC; United States Court of Appeals for the Fifth Circuit, #24911; remanded to the District Court for further evidentiary hearings, and once again now pending on appeal in the United States Court of Appeals for the Fifth Circuit, #29200.

WHEREFORE, the petitioner respectfully moves this Honorable Court to:

1. Grant the Petition for Rehearing.

2. Vacate the Judgment of the United States Court of Appeals for the Ninth Circuit.

3. Remand the case to the United States District Court for further proceedings in conformity with *Alderman v. United States, supra.*

Respectfully submitted,

E. DAVID ROSEN
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19 West Flagler Street
Miami, Florida 33130

CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies to this Court that the Petition for Rehearing herein is presented in good faith, not for delay, and is restricted to the grounds specified therein.

E. DAVID ROSEN